United States of America

IN THE

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943

No. 610

INTERNATIONAL TYPOGRAPHICAL UNION,
A VOLUNTARY ASSOCIATION,
Petitioner (Appellant Below),
vs.
COUNTY OF MACOMB, A MUNICIPAL CORPORATION, MARTIN DRAIN AND BRANCHES DRAIN DISTRICT, A PUBLIC QUASI CORPORATION, BOARD OF SUPERVISORS OF MACOMB COUNTY, GEORGE T. SMITH, DRAIN COMMISSIONER OF MACOMB COUNTY, AND CARL B. BRANDENBURG, TREASURER OF MACOMB COUNTY,
Respondents (Appellees Below).

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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Respondents (Appellees Below).

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court

of the State of Michigan entered October 11, 1943, affirming an order of the Circuit Court of Macomb County entered January 28, 1943.

(Unless clearly shown by context, figures in parentheses refer to pages of the Transcript of Record filed in this Court)

OPINION BELOW

The opinion of the Circuit Court of Macomb County granting a motion by defendants to dismiss was filed January 22, 1943 (141). The opinion of the Supreme Court of Michigan (157) was rendered October 11, 1943. It appears volume 306, p. 562 Mich. Reports. A motion for rehearing (197) was seasonably filed and denied November 29, 1943 without opinion (206).

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 237(b) Judicial Code, 43 Stat. 937, 28 U. S. C. 344(b), 28 U. S. C. A., Sec. 344(b), which gives this court jurisdiction to review a final judgment of the highest court of a state in which a decision in the suit could be had, "where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held authority exercised under the United States; and the power to review under this section may be exercised as well where the federal claim is sustained as where it is denied."

The judgment sought to be reviewed was entered October 11, 1943 (168). Motion for rehearing (197) was filed October 29, 1943, within the time authorized by the rules of said Court, and was denied November 29, 1943 (206) without opinion.

The said judgment was rendered or passed by the highest court of the State of Michigan in which a decision could be had in the case, and this petition is filed within three months after the entry of the denial of the motion for rehearing.

In such cause and judgment rights, privileges and immunities were specially set up or claimed by defendants under a statute of or authority exercised under the United States, and a federal claim was sustained; also rights, privileges and immunities were specially set up and claimed by plaintiff under the Constitution of the United States, and the federal claim was denied.

SUMMARY STATEMENT

This case involves the propriety of an order of dismissal on the ground of prior adjudication by a United States Court in a case to which petitioner was not a party, nor in privity with any party, and in which there was no service of process upon petitioner and no action taken under Section 57 of the Judicial Code, Sec. 118 Title 28 U. S. C. A., to obtain jurisdiction over any rights of petitioner in specific property.

This suit was instituted in the Circuit Court for the County of Macomb, Michigan, In Chancery, by a bill of complaint in which petitioner alleged its ownership of $200,000.00 par value of bonds issued by Martin Drain and Branches Drain District, all of which were due as to principal and in default as to interest. It set forth the proceedings taken in behalf of the district preliminary to their issue and the correctness thereof. It alleged that refusal to pay the bonds was based upon the unfounded claim that the improvement constructed with the proceeds of the bonds, of which petitioner's are a part, was not in

fact a drain, but an improvement outside of the jurisdiction of the drain commissioner to construct. It describes the improvement as a conduit built underground for the purpose of transporting surface water from the district to Lake St. Clair. It invokes the statutory provisions in relation to raising funds by taxation for the payment of the bonds, and also special statutory provision Sec. 15, Ch. X, Act 331 Michigan Public Acts 1927, which in some circumstances requires the county in which a drain district is located to pay the bonds from its general fund. The bill prays that its bonds be declared to be valid and enforceable, that a tax be levied for their payment, and that the county advance money for their payment from its general fund.

The only pleading to this bill of complaint was a motion to dismiss (14), the principal ground of which, and the only ground considered by the trial court, was *res judicata*. In this motion there was no attack on the sufficiency of the allegations of the bill, and the trial court, in disposing of the motion, conceded that for the purpose of his opinion the allegations therein must be accepted as true (142).

The claim of *res judicata* was that a case decided by the United States Circuit Court of Appeals, Sixth Circuit, was a bar to the instant case (14). From defendants' supporting affidavits and exhibits, it appears that in 1932 there was outstanding over $1,000,000.00 par value of bonds of said district (45) of the same issue as the bonds on which petitioner seeks relief, and that Kenneth M. Keefe and two co-plaintiffs, owners of 132 of said bonds, filed a bill of complaint in the United States District Court of Michigan to obtain a decree adjudicating the validity of the entire outstanding bonds, and to require performance by the county and its officials of various statutory

duties to raise funds for their payment. Plaintiffs in that case alleged that they sued in their own behalf and for other bondholders, and that the case was an appropriate class action under the existing Equity Rule 38. The district, county and its officials, and various taxpayers made defendants, contested this suit on the ground that the improvement constructed with the bond proceeds was not a drain, as that term should be understood in Michigan law, and that this was a defect which nullified the bonds. Proofs were taken and the District Judge held that while the improvement was not a legal drain, bonds were valid and enforceable because of recitals therein and good faith holding (130). Pursuant to the opinion, a judgment was entered (68) which granted the relief prayed, and made provision for other holders of bonds, not parties to the suit, to come in under the judgment and receive pro rata distributions of funds which would be made available by action which defendants were enjoined to take.

No action was taken to provide such funds because defendants promptly appealed to the Circuit Court of Appeals, Sixth Circuit, which after due consideration reversed the judgment of the district court. Its opinion, reported 119 F. (2) 157 (18) shows the issues presented on appeal. Keefe, et al., contested the lower court's decision that the improvement was illegal as a drain, but otherwise supported the principle announced in the district court that the bonds were valid because of estoppel resulting from the bond recitals. Defendants supported the holding of the lower court as to illegality of the project, and urged that this required a decision that the bonds were invalid. No question was raised as to the propriety of a class action. The decree entered in accordance with the opinion (37) merely reverses the case and dismisses the bill of complaint. Both opinion and decree are silent as

to the effect which the court intends as to persons not parties to the suit. Keefe, et al., unsuccessfully petitioned for a rehearing and for certiorari in this court.

Defendants' motion for dismissal (14) in this case shows no ground to connect this petitioner with the federal court case, except that it was one of the class for whom Keefe, et al., alleged that they instituted the suit. It was not named as a party, no process of any kind was served upon it, nor does it appear that it had a residence in the State of Michigan which would make it subject to service of process, nor does it appear that notice was issued, served or published pursuant to Section 57, Judicial Code, Section 118, Title 28, U. S. C. A. Affidavits filed in opposition to the motion show that petitioner's treasurer learned of the existence of the Keefe suit, but knew nothing concerning it except that it involved questions as to the validity of the bonds (102). It retained its bonds and made no agreement with Keefe, et al., as to the prosecution of the suit. After the Court of Appeals decision it made an unsuccessful attempt to file a brief *amicus curiae* with the Court of Appeals to urge the grant of rehearing, and later filed in this court a brief *amicus curiae*, urging that this court grant certiorari. The opinions of the lower courts make no point of these acts as a voluntary submission to the jurisdiction of the federal court. No facts appear which would establish a relationship of privity with any party to the suit. Thus the sole basis of the claim of *res judicata* is that the Keefe suit was a class action and its termination in favor of defendants prevents this petitioner from litigating any matters there decided.

This petitioner appealed from the order of the Macomb County Circuit Court assigning as error the holding that the suit was barred by prior decree (2). This necessarily included arguments that the decree was not intended

by the Court of Appeals to have the effect claimed, that the Court of Appeals had acquired no jurisdiction to pass upon its rights, and that due process as guaranteed by the Fourteenth Amendment was denied, and the briefs filed fully present the issues. The opinion of the Supreme Court of Michigan, 306 Mich. 562 (157), indicates consideration of these issues and assent to the proposition that jurisdiction of the federal court over petitioner was obtained through the allegations of Keefe, et al., that they brought their suit as a class action. A suggestion is also made in the opinion that if it were not for the holding of *res judicata,* the case if tried would have to be decided adversely to petitioner on grounds of *stare decisis.* A motion for rehearing was filed (197), in which petitioner urged error in disregarding the Fourteenth Amendment. Rehearing has been denied by an order entered November 29, 1943 (206).

Petitioner has filed with the clerk of this court a complete transcript of the record of all proceedings in the case as it was presented in the Supreme Court of the State of Michigan, duly certified by its clerk.

QUESTIONS PRESENTED BY THIS PETITION

1. In the absence of statements in a decree of a federal court of appeals, or its accompanying opinion, purporting to make matters decided thereby binding upon persons other than parties to the suit, or those in privity with them, is anything so decided *res judicata* against such person?

2. In the absence of personal service, notice in accordance with Section 57, Judicial Code, U. S. C., Title 28, Section 118, or voluntary appearance, does any decision

of a federal court (other than in actions purely *in rem*) bind persons not parties to the suit, or their privies?

3. Does authority granted by former Equity Rule 38, or present Rule 23 of Rules of Civil Procedure, to institute a class suit in the federal court, make a judgment in such suit binding upon persons not actual parties, insofar as it determines matters affecting separate and independent choses of action of a personal nature?

4. If none of the foregoing are answered in the negative, does the granting of a motion to dismiss a suit in a state court on the ground of *res judicata* by the federal court, deny plaintiff in such suit, who was not a party to the prior suit or privy thereto, due process as guaranteed by the Fourteenth Amendment?

5. Does summary denial of the right to sue in a state court on the ground of *stare decisis*, without challenge of the sufficiency of a suitor's pleading, deny due process as guaranteed by the Fourteenth Amendment?

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Manifest error reviewable in this court appears in the record, judgment and decision of the Supreme Court of Michigan referred to above, in the following:

1. In holding that the decree of the United States Court of Appeals, Sixth Circuit, entered in its suit No. 8583, entitled Martin Drain and Branches Drain District, et al., Defendants and Appellants, v. Keefe, et al., Plaintiffs and Appellees, is *res judicata* against petitioner.

2. In holding that purport of such decree was intended to be a binding adjudication adverse to petitioner as to all rights of every nature growing out of bonds issued by

defendant Martin Drain and Branches Drain District held by petitioner.

3. In holding that such decree was rendered in a proceeding *in rem,* and binding upon all the world, and that service of process and procedure pursuant to Section 57, Judicial Code, U. S. C., Title 28, Section 118, was unnecessary.

4. In holding that authority granted by former Federal Equity Rule 38 and present Rule 23 of Rules of Civil Procedure, in reference to class suits in federal courts, makes a judgment in such a class suit binding upon persons not actual parties or their privies, insofar as it determines matters affecting separate and independent choses of action of a personal nature.

5. In holding that due process as guaranteed by the Fourteenth Amendment was not violated in denying petitioner the right to sue for the enforcement of its bonds, on the ground that the decree of the Circuit Court of Appeals, identified in paragraph 1 hereof, was a complete bar to such suit.

6. In ignoring due process of law as guaranteed by the Fourteenth Amendment by dismissal of petitioner's bill of complaint on the ground of *stare decisis,* in the absence of any challenge to the sufficiency of the pleading.

Wherefore, petitioner prays that a writ of certiorari be issued out of and under the seal of this court, directed to the Supreme Court of the State of Michigan, commanding that court to certify and send to this court for review and determination, as provided by the statutes of the United States, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 42,410, International Typographical

Union, Plaintiff and Appellant, v. County of Macomb, et al.,'' unless the certified copy of said record now on file in this Court be deemed sufficient for that purpose; and that the judgment therein be reversed by this court, and that your petitioner may have such other and further relief in the premises as to the court may seem just and proper.

Dated: January 15, 1944.

INTERNATIONAL TYPOGRAPHICAL UNION,
Petitioner,

By IRVIN LONG,
Attorney for Petitioner.